RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,
*Petitioners,*

—v.—

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF COLORADO

## BRIEF OF *AMICUS CURIAE* TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*

The Transgender Legal Defense & Education Fund ("TLDEF") is a non-profit law firm that represents and advocates for the transgender community. It submits this brief in support of Respondents Charlie Craig, David Mullins, and the Colorado Civil Rights Commission.[1]

TLDEF is committed to ending discrimination against transgender people, and to achieving equality for transgender people through impact litigation and education. TLDEF's clients include transgender people of all ages, who come from diverse racial, ethnic, socio-economic, and faith backgrounds. Many of TLDEF's clients live and work in cities, states, and other localities across the United States that have enacted anti-discrimination laws that prohibit discrimination in places of public accommodation on the basis of gender identity or expression, among other protected characteristics. Notwithstanding these laws and others that protect transgender people from discrimination, TLDEF is familiar with the considerable stigma, violence, and barriers to access experienced by members of the transgender community. As such, it is uniquely positioned to opine on the importance of robust anti-discrimination laws to the dignity, prosperity, and equal treatment of transgender individuals in their everyday life, as well

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its employees, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.3.

as the substantial harm that would result from a judicially-created exemption to such laws.

## SUMMARY OF ARGUMENT

> If we did not have civil rights protection for gender identity, it would be devastating to my way of life. I have only become confident enough to come out and live openly as transgender because of the laws we now have that protect trans people from discrimination on the basis of gender identity. I am still afraid to go many places because I know there is hostility towards trans people there, but, without legal protections, it would be even more dangerous. – ***Giselle C.***[2]

Over 30 years ago, Justice O'Connor presciently warned that commercial organizations, "by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination" under the First Amendment.[3] In rejecting this position, Justice O'Connor reiterated a legal principle beyond dispute: "the State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with

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[2] TLDEF conducted a survey of the transgender community in September 2017 for purposes of this amicus brief, soliciting personal accounts to highlight the prevalence and effects of discrimination against transgender people in places of public accommodation. Responses have been lightly edited only for grammar, brevity, and to offer context where appropriate.

[3] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring).

whom one engages in simple commercial transactions, without restraint from the State."[4]

Nevertheless, Petitioner asks this Court to subordinate the substantial harms of identity-based discrimination experienced every day by patrons of public accommodations to his interest in disassociating *his* public accommodation with same-sex unions. In doing so, Petitioner attempts to revive a justification for discrimination that has been raised, unsuccessfully, in opposition to every incremental expansion of civil rights. This court has made clear that the Constitution countenances no privilege to discriminate. It should not reverse course now.

As a class, transgender people are especially vulnerable to discrimination and harassment in their everyday lives.[5] Over half of transgender individuals have experienced discrimination in a place of public accommodation in particular.[6] This brief presents personal accounts of transgender people who have encountered discrimination, illustrating what this Court already knows: discrimination in places of public accommodation inflicts grave social, material, and dignitary harm. Discrimination prevents

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[4] *Id.* at 634; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech").

[5] The language used to describe transgender individuals has evolved over time. Throughout this brief, the term "transgender" refers to individuals whose gender identity or expression differs from their assigned sex at birth—in contrast to "non-transgender" or "cisgender" people, whose gender identity or expression corresponds to their biological sex.

[6] Jaime M. Grant, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 5 (2011) (hereinafter "NTDS").

transgender people from living consistently with their gender identity and expression, jeopardizes their physical and psychological well-being, and hinders their ability to participate fully in society.

A significant number of states have addressed these concerns by enacting laws that explicitly prohibit discrimination against transgender people in places of public accommodation. These public accommodations laws ("PALs") protect transgender people from unequal treatment or denials of service by business owners who believe, for religious reasons or otherwise, that one's gender identity and expression should match one's biological sex. If the Court finds that Petitioner's conduct in refusing service to Respondents is protected speech or religious exercise under the First Amendment, then the protections for transgender people that currently exist under PALs—and all non-discrimination protections—would likely succumb to similar exemptions. As this Court's jurisprudence demonstrates, any exemption would be impossible to limit to the facts of this case. Accordingly, excusing Petitioner from the mandate of the Colorado Anti-Discrimination Act ("CADA") would amount to a judicial license to discriminate against transgender people and others who depend on the protections accorded by PALs.

This Court answered the question raised in Petitioner's brief nearly thirty years ago, when it concluded in *Employment Division v. Smith* that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to

regulate."[7] Nor does the Free Speech Clause provide an exemption from laws aimed at preventing discrimination in places of public accommodation. The decision of the Colorado Court of Appeals should be affirmed.

## ARGUMENT

### I. Transgender Individuals Face Pervasive Discrimination on the Basis of Gender Identity and Expression

Over two million Americans identify as transgender, approximating the population of the State of New Mexico and exceeding that of fourteen other states and the District of Columbia.[8] Demographically, the transgender community mirrors the diversity of society at large, hailing from every state and occupying every profession. Transgender Americans serve their country in the armed forces at rates double that of the general population, and they register to vote—and do vote—in significantly greater percentages than non-transgender citizens.[9] The transgender community

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[7] 494 U.S. 872, 888–79 (1990), *superseded by statute*, 42 U.S.C. § 2000bb, P.L. 103.141, 107 Stat. 1488 (1993).

[8] Estimates vary regarding the prevalence of transgender Americans, from 0.6-0.7% of the population to twice that rate. *See* Flores et al., Williams Institute, *Age of Individuals Who Identify as Transgender in the United States* 2 (2017); *see also* Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychol. 832, 832 (2015) ("[P]opulation estimates likely underreport the true number of [transgender] people").

[9] NTDS, *supra* note 6, at 30; James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 231, 231–32 (2016).

comprises bright, socially active people committed to civic participation and engagement.

Yet, as courts across the country increasingly recognize, "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity" or expression.[10] Unfortunately, "this history of persecution and discrimination is not yet history."[11] Transgender people "have suffered a history of persecution and discrimination,"[12] and continue to be routinely subjected to "mistreatment ranging from commonplace disrespect to outright violence, abuse[,] and the denial of human dignity."[13]

In 2016, the National Center for Transgender Equality completed a comprehensive national survey of discrimination against transgender people, the results of which revealed the extent of discrimination that transgender people face in all facets of life, including employment, housing, healthcare, education, and places of public accommodation.[14] This survey

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10 *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *see also Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) ("transgender people as a class have historically been subject to discrimination"); *Board of Educ. of the Highland Local Sch. Dist. v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 873–74 & n.13 (S.D. Ohio), *stay denied*, 845 F.3d 217 (2016) (same); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (acknowledging "history of persecution and discrimination" of trans people).

11 *Adkins*, 143 F. Supp. 3d at 139.

12 *Id.*

13 NTDS, *supra* note 6, at 8.

14 NTDS, *supra* note 6, at 2. Numerous federal and state courts have relied on the results of this Survey in adjudicating cases implicating the rights of transgender people. *See, e.g.*,

documented rampant discrimination against transgender people in restaurants, mass transit, hotels, health clinics, and other public spaces.[15] *Half* of the respondents reported experiencing verbal harassment and being denied treatment or service in a place of public accommodation.[16] Eight percent reported that they had been physically attacked or assaulted in a place of public accommodation.[17] Retail stores were the location where respondents reported encountering the highest rates of discrimination on the basis of their gender identity or expression.[18]

The consequences of anti-transgender discrimination are severe, both for the individuals suffering discrimination as well as their communities. Transgender people graduate college and receive professional degrees at greater rates than the general population—but they also experience disproportionately high levels of unemployment, poverty, and homelessness because of discrimination.[19] Transgender people reported postponing medical care due to unequal treatment by health professionals,[20] and transgender individuals who experience harassment and discrimination are over eight times more likely to attempt suicide than non-transgender people.[21]

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*Whitaker*, 858 F.3d at 1051; *Adkins*, 143 F. Supp. 3d at 139; *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

15 NTDS, *supra* note 6, at 124–35.

16 NTDS, *supra* note 6, at 5.

17 NTDS, *supra* note 6, at 124.

18 NTDS, *supra* note 6, at 129.

19 NTDS, *supra* note 6, at 23.

20 NTDS, *supra* note 6, at 6.

21 Williams Institute, Suicide Attempts Among Transgender and Gender Non-Conforming Adults 2 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-

Discrimination also restricts transgender people's ability to participate in the public marketplace. The repercussions of an individual instance of discrimination are far reaching, as public "outings" of someone as transgender increase the possibility of harassment, discrimination, or violence in other aspects of that person's life.

It is one thing to describe discrimination against transgender people in the abstract. It is quite another to hear the accounts of transgender individuals in the first person, as *amicus* does every day. As documented in the NTDS survey discussed above, anti-transgender bias is regrettably commonplace in places of public accommodation, resulting in denials of service, stigma, and humiliation for transgender people. *Amicus* offers the following personal accounts to illustrate the kinds of pernicious discrimination against which transgender people would lose protection if this Court adopts Petitioner's interpretation of the First Amendment. These accounts demonstrate that the issues in this case have broad significance to the lives of transgender people. As one woman recounted:

> Two to three times a week, a cashier or sales clerk [will] purposely misgender me when my gender is clearly female. When someone

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Williams-Suicide-Report-Final.pdf; *see generally* Bockting, et al., *Adult Development and Quality of Life of Transgender and Gender Nonconforming People*, 23 Current Opinion in Endocrinology 188, 188 (Apr. 2016) (cross-disciplinary panel of transgender health experts commissioned by NIH documenting the health harms to trans persons from discrimination); Lisa Miller & Eric Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, Sociological Forum, Vol. 30, No. 3, p. 809 (Sept. 2015) (same).

> calls you "sir" in spite of your gender presentation, it is a hostile act and you can't help but feel threatened. It is as though they are saying, "Yes, I see that you 'think' you're a woman . . . but it is more important to me to express my distaste for transgender people and my indignation at having to serve you or look at you . . . ." – ***Giselle C.***

The discrimination experienced by transgender people in places of public accommodation can range from using incorrectly gendered terminology, to harassment and belittling conduct, to complete denials of service, to assault. Regardless of whether an employee speaks with a transgender customer, it constitutes discrimination for an employee of a place of public accommodation to turn away a customer because of the customer's gender identity or expression:

> I have had a couple of experiences at restaurants over the years, places where they say seat yourself and you sit, and the wait staff ignores you. At first you think that they are simply busy, but then you try to catch them and they pointedly ignore you or say they will send someone over. It becomes a waiting game. After 30 minutes and watching other people be served who came in after you, it's clear they are not going to serve you. . . . It feels humiliating and demoralizing. I fear going into restaurants, particularly local small business type places. It's like my money isn't good enough. – ***Gunner S.***

In addition to restaurants and retailers, transgender people reported frequent discrimination at businesses

that involve the provision of bespoke goods or services to customers, which would fall within the exception that Petitioner here claims with respect to his cakes. For example, as the following account illustrates, discrimination is common in places of public accommodation that offer gendered goods or services, such as salons, barbers, estheticians, tailors, and other personal-care companies:

> I went into a local hair salon that serves both male and female clients. I asked for a haircut for myself and for my son. First, they ignored me and waited on the next walk-in customer that came in after me. Then, I was told to come back in a half hour. When I came back, they waited on my son with no issues. Again I was ignored. I again asked for a haircut for myself and corrected them when they consistently misgendered me. . . . This experience made me feel embarrassed. There were other customers watching and even participating in the discriminatory treatment towards me. My son was with me and saw how people treated his father differently from others. It made me feel angry and humiliated. It made me feel like I have to watch my back in my small town. – ***M.M.***

The damaging effects of discrimination are myriad for transgender people. For example, public accommodations include pharmacies and medical facilities, where health providers become privy to individuals' transgender status and may use this information to deny or obstruct access to treatment, refuse to supply necessary prescriptions, or otherwise harass transgender individuals. Often, the justification given for the unequal—or wholesale

denial of—treatment to their transgender clients is based on religious or moral grounds:

> I was denied my hormone prescription by a pharmacist because he believed, "it is not being used for the correct purpose." I had to travel over ten extra miles to find a pharmacy that would fill my prescriptions. At the time, I had no means of transportation. It was a major issue for me, and I felt marginalized and unimportant. . . . As I left, I was humiliated and weeping uncontrollably. – ***Gabrielle K.***

> As my being transgender is a relevant piece of medical information, and because the privacy of such privileged information is protected under HIPAA, I revealed this information to [the doctor] when he entered the treatment room. His immediate response was, "I believe the transgender lifestyle is wrong and sinful." . . . The rest of the time between the examination and him writing the prescription, he asked questions about how transgender women find sexual intimacy. As he had yet to hand over the prescription, I felt compelled by the power dynamic to provide answers to questions I would normally tell an asker are none of his or her business. . . . [I]t was very creepy having this conversation with this person, and I felt I had the filthy end of the stick and was being subordinated by this doctor because he felt he could. – ***Karen S.***

As these accounts make clear, discrimination on the basis of gender identity and expression causes

physical, pecuniary, and dignitary harms to the transgender community. It is alongside this reality that this Court must consider the compelling interest of Colorado and other states, counties, and cities in protecting their most vulnerable citizens.[22]

## II. Anti-Discrimination Laws Are States' Primary Means of Eliminating Discrimination on the Basis of Protected Characteristics, Including Gender Identity and Expression

This Court has long recognized that PALs like CADA have "a venerable history."[23] At common law, all businesses that held themselves open to the public were required to "serve anyone who sought service."[24] Throughout the last century, states and localities have codified these principles of equal treatment by enacting PALs, which expanded the scope of businesses subject to the common law's anti-discrimination mandate, and the classes of people that the law protects from discrimination. Today, PALs serve as an inimitable tool for eradicating

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[22] The intersection of transphobia and other structural inequalities such as racism, classism, or xenophobia may worsen the experiences of discrimination among transgender people. According to the NTDS, transgender people of color are more likely to be affected by anti-transgender bias and are more likely to encounter discrimination in places of public accommodation, particularly within healthcare settings. NTDS, *supra* note 6, at 2, 6, 72, 131.

[23] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 571 (1995).

[24] Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Northwestern L. Rev. 1283, 1292 (1996); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) ("These [public accommodations] laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment.").

discrimination in the provision of public goods and services, which is why this Court has repeatedly affirmed the significant constitutional weight accorded to states' interest in preventing discrimination with PALs. Like the common law, PALs continue to regulate only discriminatory conduct by public businesses, so the First Amendment is not implicated by PALs' prohibitions on discrimination.

### A. History and Structure of Public Accommodations Laws

Cities, counties and states have been at the forefront of extending anti-discrimination protections as "new insights and societal understandings . . . reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[25] For example, in the 1970s, when refusal of service to LGBT people was common practice, the District of Columbia and dozens of cities and counties extended the protection of their PALs to gay and lesbian people[26] and, beginning in Minnesota in 1993, explicitly to transgender people.[27] Lawmakers have recognized the necessity of robust anti-discrimination laws to remedy "[t]he scourge of harassment and discrimination against transgender individuals [that] is well-known—and has also gone largely unanswered for too long" as "laws have lagged behind the reality of people's lives."[28]

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[25] *Obergefell v. Hodges*, 135 S. Ct. 25, 84 (2015).

[26] Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 269–70 (1978)

[27] *See* Minn. Stat. § 363A.11.

[28] Office of Governor Andrew Cuomo, *First Executive in the Nation to Issue State-Wide Regulations Prohibiting Harassment*

The majority of states prohibit discrimination in places of public accommodations based on sex, and many state courts or agencies have interpreted those laws to protect transgender people.[29] Today, nineteen states (including Colorado) and the District of Columbia have also explicitly enacted laws or regulations that prohibit discrimination against transgender people in public accommodations.[30] In

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*and Discrimination on the Basis of Gender Identity, Transgender Status or Gender Dysphoria* (Oct. 22, 2015), https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination.

[29] *See, e.g.*, *Enriquez v. West Jersey Health Sys.*, 342 N.J. Super. 501, 514–15 (N.J. App. Div. 2001) (concluding that trans people are protected by state law prohibitions against sex and disability discrimination); *Lie v. Sky Pub. Corp.*, 15 Mass. L. Rptr. 412, at *13–15 (Mass. Super. Ct. 2002) (holding that a trans person had stated a viable sex discrimination claim under state law). Courts and administrative agencies in other states have ruled that state disability laws protect people against discrimination based on gender dysphoria. *E.g. Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882, Order No. 88-5451 (Fla. Div. Admin. Hrgs. 1991) (holding that an individual with gender dysphoria is protected by Florida Human Rights Act's prohibitions of discrimination based on disability and perceived disability).

[30] Cal. Civ. Code §§ 51(b), 51(e)(4); Colo. Rev. Stat. Ann. § 24-34-402; Conn. Gen. Stat. § 46a-64; Del. Code Ann. tit. 6, § 4501; Hawaii Rev. Stat. § 489-3; 775 Ill. Comp. Stat. 5/1-102; Iowa Code Ann. § 216.7; Me. Rev. Stat. Ann. tit. 5, § 4592; Md. Code Ann. § 20-304; Mass. Gen. Laws, ch. 272 § 92A; Minn. Stat. § 363A.11, subd. 1; Nev. Rev. Stat. § 651.070; N.H. Rev. Stat. § 354-A:1; N.J. Stat. Ann. § 10:5-4; N.M. Stat. Ann. § 28-1-7(F); 9 N.Y.C.C.R. § 466.13; Or. Rev. Stat. § 659A.403; R.I. Gen. Laws § 11-24-2; Vt. Stat. Ann. tit. 9, § 4502(a); Wash. Rev. Code § 49.60.215; D.C. Code § 2-1402.31. For up-to-date information on which states extend protections to transgender people, see Movement Advancement Project, *Equality Maps: Non-*

addition, approximately 150 cities and counties in states that lack comprehensive PALs that explicitly include gender identity and expression have passed anti-discrimination ordinances that confer such protections to transgender people.[31] Thus, over half of transgender Americans currently reside in communities with laws that explicitly guarantee them the right to access places of public accommodations on a non-discriminatory basis.[32]

The strength and breadth of PALs are the result of decades of concerted effort by legislatures, advocacy groups, and courts. After a federal statute banning racial discrimination in public accommodations was invalidated, states and localities enacted statutes codifying the common-law duty to serve patrons in a

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*Discrimination Laws*, available at http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

[31] *See* Movement Advancement Project, *supra* note 30.

[32] *See id.*; Flores, *supra* note 8, at 4–5. CADA, in relevant part, makes it unlawful "for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ." See Colo. Rev. Stat. § 24-34-301(7) (defining sexual orientation as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof"); 3 Colo. Code Regs. § 708-1, Rule 10.2 (GG), (Q)–(R) (defining transgender to mean "having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth"; in turn, the regulations define gender identity as "an innate sense of one's own gender" and gender expression as "external appearance, characteristics or behaviors typically associated with a specific gender").

non-discriminatory manner.[33] By the 1980s, this Court observed that PALs had "depart[ed] from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."[34] This Court further acknowledged the evolution of these laws to extend their protections to additional vulnerable groups of people, including gay and lesbian people, as "new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[35] As frequent targets of discrimination, transgender people now depend on existing PALs to secure them equal treatment in places of public accommodation.[36]

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[33] "Within two years of the ruling [in *The Civil Rights Cases*], eleven state legislatures in the North and West passed civil rights statutes of their own, and by century's end a total of eighteen states had mandated racial equality in public accommodations." A. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 Law & Hist. Rev. 53, 78 (2005).

[34] *Romer v. Evans*, 517 U.S. 620, 628 (1996); *see, e.g.*, *Telescope Media Grp. v. Lindsey*, No. 16-4094 (JRT/LIB), 2017 U.S. Dist. LEXIS 153014, at *2 (D. Minn. Sep. 20, 2017) (discussing Minnesota's interpretative guidance for wedding-related businesses regarding compliance with the state's antidiscrimination law).

[35] *Obergefell*, 135 S. Ct. at 2596.

[36] *See, e.g.*, *Blachana, LLC v. Oregon BOLI*, 359 P.3d 574 (Or. 2015) (affirming order awarding damages to gay and transgender customers denied service by a bar in violation of Oregon's PAL, and rejecting club owner's claim that order violated his free speech rights); *Doe v. City of New York*, 42 Misc. 3d 502, 506 (2013) (holding a state benefits agency

### B. States Have a Compelling Interest in Eliminating Discrimination in Public Places and the Dignitary Harms Such Discrimination Inflicts

The success of PALs has always stemmed in part from the deterrent effect of proscribing discrimination.[37] In declaring that a marginalized group has an equal right to access goods and services in a non-discriminatory fashion, the state acknowledges the existence of discrimination, and accords recognition to the previously subjugated group. Further, public accommodations laws insert a judicially-enforceable mechanism between protected classes and discriminatory conduct, thereby creating a baseline expectation of equal treatment.

Petitioner and various *amici* have suggested that Respondents were not damaged by being turned away at Petitioner's bakery because they were able to obtain a wedding cake from another vendor. This contention misconstrues CADA and other PALs and the harms they address. PALs typically codify a legislature's intent "to ensure the human dignity of all people within the state"[38] and "to insure that every individual shall have an equal opportunity to

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discriminated against a transgender woman by refusing to update its records to reflect her new legal name and gender marker); *Bumpus v. New York City Transit Auth.*, 2008 NYLJ LEXIS 1169, *8–9 (N.Y. Sup. Ct. Feb. 13, 2008) (upholding claim by a transgender woman after transit officer yelled derogatory names and bigoted epithets at her because of her gender identity when she asked for assistance).

[37] Lerman, *supra* note 26 at 270.

[38] Or. Rev. Stat. § 659A.403; *see also* 5 M.R.S.A. § 4552 ("it is declared to be the policy of this State to keep continually in review all practices infringing on the basic human right to a life with dignity").

participate fully in the economic, cultural and intellectual life of the state."[39] As the U.S. Senate Commerce Committee acknowledged in the context of the public accommodations provisions of the Civil Rights Act, "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public."[40] This Court likewise found that Title II's "overriding purpose" is "to remove the daily affront and *humiliation* involved in discriminatory denials of access to facilities ostensibly open to the general public."[41] In the context of CADA, the Supreme Court of Colorado confirmed that the statute requires no proof of pecuniary damage.[42]

Other PALs that stand to be implicated by this Court's decision also specify that states' primary interest in enacting PALs was to prevent the stigmatic harms of discrimination. New Jersey's public accommodations law, for example, recognizes the myriad injuries such discrimination can inflict: "because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or

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39 McKinney's New York Executive Law § 290(3).

40 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring) (quoting S. REP. NO. 88-872, at 16 (1964)).

41 *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., at 18) (emphasis added).

42 *See Crosswaith v. Bergin*, 35 P.2d 848 (Co. 1934) (rejecting defense plaintiff had "not proven five cents damages").

other irreparable harm."[43] The NTDS survey discussed above emphasizes the disproportionate rates at which transgender people suffer these harms because of discrimination.

The compelling governmental interest in banning discrimination to vindicate the dignitary rights of protected groups is well established. In *Roberts v. U.S. Jaycees*, this Court unanimously rejected a First Amendment challenge to the application of Minnesota's PAL to an organization open to the public that sought to exclude women.[44] This Court found that the PAL did not unduly infringe club members' First Amendment rights even though it required the club to admit women on the same basis as men.[45] To the contrary, this Court explained that the PAL "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services," and held that the PAL was "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order."[46] Moreover, the Court endorsed the strength of the states' interests in counteracting the dignitary harms of all forms of discrimination, including "stigmatizing injury, and the denial of equal opportunities that accompanies it."[47] As the Court reasoned, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that

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43 N.J. Stat. Ann. 10:5-3 (2007).

44 *Roberts*, 468 U.S. at 625.

45 *Id.*

46 *Id.* at 624.

47 *Id.* at 625.

government has a compelling interest to prevent."[48] This Court's logic compels upholding the validity of CADA as it was applied here to a paradigmatic place of public accommodation: a retail store into which the public is invited.

### C. The Constitution Does Not Require an Exemption to Anti-Discrimination Laws

This Court once observed that "invidious private discrimination may be characterized [by litigants] as a form of exercising freedom . . . but it has never been accorded affirmative constitutional protections."[49] Petitioner nevertheless invites this Court to adopt the paradoxical position that what the Equal Protection Clause forbids—stripping LGBT people of the protection of anti-discrimination laws—the First Amendment mandates. There is no reason for the Court to deviate from its well-established precedent: the First Amendment does not require an exemption to neutral laws that proscribe discriminatory commercial conduct without any regard to the motivation for such conduct.[50]

Petitioner's reliance on *Hurley* to the contrary is misplaced. Even if the forced-association cases are relevant, the Court in *Hurley* acknowledged the presumptive validity of PALs, declaring that

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[48] *Id.* at 625, 628. This Court subsequently reaffirmed "the State's 'compelling interest' in combating invidious discrimination" in two unanimous decisions rejecting First Amendment challenges to California's and New York City's public accommodations laws. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) (quoting *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987)).

[49] *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

[50] *Smith*, 494 U.S. at 889.

"[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination," as is the case with transgender people.[51] Moreover, the *Hurley* Court explicitly recognized the content neutrality of PALs like CADA, "the focal point of [the law's] prohibition being rather on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."[52] Here, however, the case at bar and *Hurley* diverge: whereas *Hurley* involved the "peculiar" application of a public accommodations law to a private parade, which constituted pure speech for First Amendment purposes, this case entails a prototypical application of CADA to Petitioner's denial of service to Respondents in a retail setting.

"The expressive nature of a parade was central to [the] holding in Hurley,"[53] a decision that reiterated this Court's longstanding recognition that "marching to make a point" represents the exercise of "'basic constitutional rights in their most pristine and classic form.'"[54] In contrast, the operation of a retail bakery—including the obligation to create wedding cakes on a non-discriminatory basis—simply "lack[s]

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51 *Hurley*, 515 U.S. at 572.

52 *Id.* (emphasis added).

53 *Rumsfeld v. Forum for Academ. & Institutional Rights* ("*FAIR*"), 547 U.S. 47, 63 (2006).

54 *Hurley*, 515 U.S. at 568–69 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)); *see also Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment").

the expressive quality of a parade, a newsletter, or the editorial page of a newspaper."[55]

In making the inquiry as to whether conduct is "inherently expressive," this Court has cautioned that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[56] Compared to the acts this Court has deemed to be quintessentially expressive, it is clear that Petitioner's sale of baked goods does not command the same constitutional treatment.[57] To borrow from this Court's conclusion in *FAIR*, to the extent that CADA "incidentally affects expression," Petitioner's effort to analogize his baking with First Amendment precedent "plainly overstates the expressive nature of their activity and the impact of [CADA] on it, while exaggerating the reach of [the Court's] First Amendment precedents."[58] Accordingly, this Court should deny Petitioner's extraordinary demand for an exemption to CADA. Discrimination against transgender people on the basis of their gender identity or expression is mere conduct, devoid of expressive content, and neither transgender people nor the states and localities in which they reside are

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55 *FAIR*, 547 U.S. at 64.

56 *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

57 *See Texas v. Johnson*, 491 U.S. 397, 405 (1989) (finding the American flag is "pregnant with expressive content," and thus that the First Amendment protects burning it in protest or refusing to salute it); *Brown v. Louisiana*, 383 U.S. 131 (1966) (finding sit in by African-Americans in a "whites-only" area to resist segregation expressive).

58 *FAIR*, 547 U.S. at 70.

required by the Constitution to tolerate such invidious conduct against them.

### III. Creating an Exemption to Anti-Discrimination Laws Would Eviscerate Protections for Transgender Individuals

Permitting exemptions for retail stores on the basis of freedom of religion or of expression would legitimize the very discrimination that PALs were designed to guard against. Exemptions, which signal that *some* discrimination is acceptable, run contrary to PALs' primary purpose of counteracting the deprivation of personal dignity that accompanies the denial of equal access to public establishments.[59] The subjectivity inherent in the determination of when either kind of exemption applies would also deprive courts of a principled means of prospectively cabining the scope of the exemption. Granting Petitioner any exemption will thus weaken protections for transgender individuals residing in states and localities with PALs, resulting in discrimination against—and engendering fear in—transgender people in places of public accommodation there.

Petitioner's claim that an exemption created by the Court in this case could be narrowly drawn is belied by common sense and decades of case law. In the context of religious-based exemptions, this Court has explained "[r]epeatedly and in many different contexts" that such exemptions are difficult to adjudicate because "courts must not presume to

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[59] *See Telescope Media Grp.*, 2017 U.S. Dist. LEXIS 153014, at *39 ("[A]n act of discrimination is harmful not merely because it might result in unequal access to goods or services, but also because the act itself 'generates a feeling of inferiority as to [one's] status in the community.'" (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

determine . . . the plausibility of a religious claim."[60] Courts are constitutionally forbidden from questioning religious belief, no matter how idiosyncratic or exceptional: "it is not within the judicial function and judicial competence to inquire whether the [litigant] . . . correctly perceived the commands of [his] . . . faith. Courts are not arbiters of scriptural interpretation . . . ."[61] In a related vein, courts cannot determine when compliance with a law would impermissibly infringe on a particular religious belief.[62]

There is no principled reason to expect that an exemption for sincerely held religious beliefs would apply only to objectors to same-sex marriage. As the accounts *amicus* collected make clear, religious justifications are often offered in defense of anti-transgender bias in places of public accommodation. Numerous transgender people recounted to *amicus* interactions in which people referenced God or the Bible in refusing to provide services that corresponded to the customers' gender identity or expression—ranging from haircuts to fulfilling prescriptions for gender-confirming hormones. In fact, one state has already enshrined this transphobic

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60 *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990); *see also Hernandez. v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

61 *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

62 *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

stance into law,[63] disregarding the consensus contrary view of medical, psychological, scientific, and many religious communities.[64] The exemption sought by Petitioner will open the door to widespread discrimination, undermining the purpose of PALs of ensuring equal treatment for the transgender community.

There is also no reason a religious exemption would be limited to PALs. Granting Petitioner an exception would create a *de facto* amendment to every

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[63] *See* Miss. Laws 2016, HB 1523 § 2(c) (eff. July 1, 2016) (defining sex as an individual's "immutable biological sex as objectively determined by anatomy and genetics at the time of birth" and providing special legal protections for persons who discriminate on this religious or moral basis); *see also Barber v. Bryant*, 193 F. Supp.3d 677, 693-94, 709 (S.D. Miss. 2016) (preliminarily enjoining enforcement of HB 1523, which would invalidate local anti-discrimination laws and violate both the Equal Protection and Establishment Clauses), *vacated on standing grounds*, 860 F.3d 345 (5th Cir. 2017).

[64] *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 277 (W.D. Pa. 2017) (reviewing medical evidence and finding "that external sex organs are one (but by no means the only or most accurate) indicia of a person's sex and gender, that being transgender is not a 'preference,' that being transgender has a medically-recognized biological basis, and that it is an innate and non-alterable status."); Stanley R. Vance, Jr. et al., *Psychological and Medical Care of Gender Nonconforming Youth*, 134 Pediatrics 1184, 1185 (Nov. 2014) ("Gender is increasingly viewed as a continuum between maleness and femaleness."); Veronica Meade-Kelly, *Categorical Denial*, UCLA Health *U* Magazine, Vol. 35, No. 2 (Spring 2015) ("Society has categorical views on what should define sex and gender, but the biological reality is just not there to support it.") (quoting Dr. Eric Villain, director of UCLA's Center for Gender-Based Biology); *see generally* Claire Ainsworth, *Sex Redefined*, 518 Nature 288 (Feb. 18, 2015); Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199 (Feb. 2015).

legislative or judicial decree to which an individual or association can generate a religious objection. Petitioner is not the first commercial enterprise to seek an exemption from a generally applicable law on the basis of his religious belief.[65] Importantly for the transgender community, PALs complement and mirror *other* statutes that bar discrimination in areas where transgender people are susceptible to unequal treatment, such as employment and education, for which there is unanimity among courts that there is no corollary exemption. This Court rejected a similar argument in considering the scope of religious freedom restoration acts rejecting the claim that religious exemptions could be asserted to justify discrimination in violation of Title VII.[66]

TLDEF submits that it is incongruous that a religious objection to anti-discrimination laws could be simultaneously permissible in the public accommodation context, but reprehensible in other sectors. For instance, it is implausible that a

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[65] *See, e.g., Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (S.C. 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985) (owners of closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible.").

[66] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014); *cf. Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976) (rejecting First Amendment challenge to application of section 1981 to private school that discriminated on the basis of race).

restaurant owner could be barred from *firing* an employee because of his transgender status, but permitted to *refuse service* to transgender customers. Unless the decision of the Colorado Court of Appeals is affirmed, states will be required to defend every statute from similar challenges, with no way to assess the legitimacy of a litigant's professed ideology and the religious tenets of that ideology. In some cases, a state might defeat the objector's claim by showing it would undermine compelling government interests. However, for the reasons stated above, this Court should anticipate that in other cases religious objectors will gain a means to bypass neutral, generally applicable laws for reasons that are unavailable to others who might object on secular grounds.

Petitioner also seeks an exemption under the Free Speech Clause based on his objection to same-sex marriage. But an exemption limited to the same-sex marriage context would vitiate the religious justification offered by Petitioner because the First Amendment does not preference religious beliefs over the expression of non-religious speech. To the contrary, the First Amendment proscribes the establishment of religious over secular preferences.[67] Thus, any opponent of same-sex marriage—or transgender status—would be on equal constitutional footing to refuse service regardless of the motivation behind his or her belief. The consequence of such an exemption would be the judicial constitutionalization of animus against a protected class on First Amendment grounds. As one court put it, "to carve out a 'free speech exception' to [PALs] . . . would leave a gaping hole in antidiscrimination law for expressive

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[67] *See* Const. Amend I.

businesses" because endorsing such an exception "would leave many customers unprotected from invidious discrimination."[68] As with the free-exercise exemption, it would also be difficult to limit a free-speech exemption to PALs without inviting identical challenges to other anti-discrimination statutes for which this Court has already rejected the contention that such laws "infringe [First Amendment] constitutional rights of expression or association."[69]

The motivation behind an act of discrimination is often opaque, and the uncertainty attendant to any exemption will chill transgender people's participation in the public marketplace. When asked, transgender people were justifiably wary of any such exemption, and vocal on the impact it would have on their everyday lives and self-esteem:

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[68] *Lindsey*, 2017 U.S. Dist. LEXIS 153014, at *42 n.27; *see also Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting freedom of expressive association challenge to application of Title VII to partnership decisions); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") (reversing state court's grant of custody to a father as in the child's best interest because the child's mother was in an intimate, interracial relationship).

[69] *See Hishon*, 467 U.S. at 71–73; *see also Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 62 (2006) ("The fact that [a law barring racial discrimination in hiring] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (noting that Title VII, which prohibits discrimination in employment, is "a permissible content-neutral regulation of conduct").

> It would allow any business in town to deny me service. My children could face harassment. . . . We could be forced to move if people wanted to chase our family out of town. I live in a small conservative town. – ***M.M.***

An exemption would infringe on transgender people's ability to express themselves consistent with their gender identity, causing stigma, anxiety, and depression among the transgender community. As noted by this Court in *Roberts*, the dignitary harm associated with discrimination also impacts society as a whole by depriving it of "the benefits of wide participation in political, economic, and cultural life."[70] Absent robust PALs, minority groups can be excluded from an "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[71]

> That change would be a significant burden for us in terms of happiness, mental health, and ability to engage in day-to-day activities. We would definitely feel uncomfortable engaging in regular activities. We don't visit the area where the local store that discriminated against us is located. We avoid it at all costs. And I would assume that without protection, the situation would be far worse. – ***Anonymous***

> I already fear travel. My kids and grandkids live 1300 miles from me. I fear losing protections from discrimination could leave

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70 *Roberts*, 468 U.S. at 625.

71 *Romer*, 517 U.S. at 631.

> me stranded halfway through my travels because some insolent cashier refused to sell me gasoline. – ***Gabrielle K.***
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> It would cause me to question every place I went. I would probably spend less money at small businesses and buy more stuff online . . . which limits what I can and cannot buy. – ***Gunner S.***

Even an exemption limited to goods and services that have a communicative or expressive component might be invoked by businesses like hair salons and tailors to deny transgender customers goods and services, and could be used by medical facilities, doctors, or surgeons to deny treatment to transgender patients.

The message echoed in the accounts from people who have experienced transphobic discrimination—which is the majority of transgender individuals—is that the *prospect* of an exemption produces the same stigmatic harms that states and courts intend PALs to prevent:

> As a mature transgender woman approaching retirement, it would cause me to become more withdrawn from society than I already am. It would devastate my belief in the America[n] justice system and probably bring on a depression of which I would never escape. – ***Rachel P.***
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> If operators of public spaces were allowed to discriminate against me for being [transgender], it would not only severely limit the businesses or civic facilities I could use, but it would have a severe impact on my mental health. – ***Gwyn C.***

> It would destroy my mental health, for the words of law provide me with the only hope I have. – ***Alanna W.***
>
> If I were to lose legal anti-discrimination protection, I think I would entirely avoid many public places and businesses. . . . which would definitely have an impact on my mental health. – ***Anonymous***

An exemption rooted in either the Free Speech or Free Exercise Clauses will sound the death knell for the anti-discrimination protections transgender people depend upon in their everyday lives.

## CONCLUSION

For the foregoing reasons and those set forth in the briefs of Respondents and the other *amici* in support thereof, this Court should affirm the decision of the Colorado Court of Appeals.

Respectfully submitted,

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